

# Lifeline

*A Legal Network  
in Support of Life*

A P U B L I C A T I O N O F T H E L I F E L E G A L D E F E N S E F O U N D A T I O N

## CASES

Mike Millen

### Another Casualty of “Our Whatever-It-Takes” Proabortion Jurisprudence

Scalia: “Does the deck seem stacked? You bet.”

For those of us who believe that the state has a higher interest in protecting the lives of the unborn than it does in collaborating with moms who desire to abort their ill-timed or inconvenient children, awaiting a decision from our current Supreme Court is much like watching “Godzilla Versus The Smog Monster”: you know the dialogue is going to be bad and that there will be dismembered victims in the aftermath, but you can’t help but open one eye in wonder as to how far the authors will go in shocking us.

The Supreme Court’s June 28, 2000, decision in *Hill v. Colorado* deals out this wonderment in spades. Not only did the High Court break faith with numerous free speech precedents, but it did so at the expense of core First Amendment freedoms, namely picketing and leafleting. However, the Court’s disregard for its own prior decisions spells trouble for more than just the First Amendment. The Court’s decision in *Hill*, combined with its decision the same day striking down Nebraska’s ban on partial birth abortion, sent a chilling message to pro-lifers: we will find or create whatever legal standard best serves the goal of uninhibited access to abortion.

The only consolation of the *Hill* decision is that it arrived with a built in error detector in the form of Justice Antonin Scalia’s blistering dissent joined in by Justice Thomas. Thus, the

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A quick bit of background: Colorado was concerned about “preventing the willful obstruction of a person’s access to medical counseling and treatment at a health care facility,” so it passed Colo. Rev. Stat. §18-9-122. Section 2 of the act imposes criminal and civil liability on a person who “knowingly obstructs, detains, hinders, impedes, or blocks another person’s entry to or exit from a health care facility.” Such language is not surprising given that the Attorney General of Colorado

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Against “Non-Persons”

## GENERAL RECAP & UPDATE

**Conservatorship of Wendland**—After arguments before the Third District Court of Appeal, the Court’s decision was to remand the case for trial. They upheld the standard of proof used during the first trial, (clear and convincing evidence), but held that Rose Wendland, (Robert Wendland’s wife and conservator), must only prove she acted in good faith based on medical advice. The court characterized her decision to end Robert’s life as one of privacy and choice, stating that, of course, Rose has every right to discontinue Robert’s life-sustaining treatment. **On June 21, the California Supreme Court voted unanimously to grant Robert’s mother’s request that it review the appellate court’s decision.** Briefing will begin immediately. *The Conservatorship of the Person of Robert Wendland* (2000) 78 Cal.App.4th 517; 93 Cal.Rptr.2d 550.

**Foti v. Planned Parenthood**—This action by a sidewalk counselor against PP and its (RECAP CONT. ON PAGE 2)

(RECAP CONT. FROM PAGE 1)

escorts is now in the discovery stage. On July 13, the Court of Appeals heard argument on PP's writ seeking an order allowing them to conceal the identities of witnesses from the pro-lifers.

**Planned Parenthood v. Foti**—*Foti v. PP* sparked this countersuit by Planned Parenthood against Ross Foti and others, trying to move them across the street from three clinics. In the meantime, one of the clinics has closed for good!

**Charles Spingola, et al. v. City of Fremont**—Pro-lifers arrested at street fair for pro-life sign/speech. Victory: case settled for monetary damages.

**Reeves v. Rocklin United School District**—Pro-lifers leafleting and holding signs were detained after high school administrators involved the local police; during a second visit to the same school, pro-lifers were forced to move off the campus after being refused visitor registration, they were also told that the public street adjacent to the school was off-limits. Decision from trial court pending.

**Kelly v. County of Orange**—Nurse Karen Kelly, who was fired for not violating her pro-life convictions, sued the County of Orange for wrongful termination and religious discrimination. Trial set for November 14, 2000.

**Ohio v. Spingola and Spingola v. Ohio State**—Pro-lifer convicted for free speech activities on campus; appeal denied. [See interview with Chuck Spingola's attorney Tom Condit, this page]

**North Dakota v. Family Life Services**—State Attorney General took over pro-life ministry, placing Family Life Services in permanent receivership. On appeal at North Dakota State Supreme Court. Decision pending. Update on page 4.

**U.S. v. Alaw (Wash., D.C.)**—Department of Justice suing rescuers civilly for "blocking" a clinic where no abortions were taking place and doors were locked. Judge issued injunction in spite of lack of evidence. Decision on appeal.

**Spingola v. U.C. Regents (Berkeley)**—

(RECAP CONT. ON PAGE 4)

## ASK THE ATTORNEY

Rose Grimm

### An Interview with Tom Condit

Tom, tell me about your background and education.

I was born and raised in Cincinnati, Ohio, one of eleven children. We are a traditional Roman Catholic family educated in the Catholic schools. I can't resist quoting Henry Hyde or Bob Dornan, whoever it was who said that he "was educated by the Jesuits before they left the Church." I like to say that I was educated by the Jesuits *after* they left the Church. Anyway, I graduated from St. Xavier High School here in Cincinnati in 1974.



I attended Western Kentucky University (WKU) in Bowling Green, Kentucky, graduating in 1978 with a BA in Government and Philosophy. I then returned for a fifth year to get certified to teach, with a minor in Mathematics.

On a personal note, an athletic pursuit was the reason I stayed longer at WKU, which had an excellent track and field program. I was a decent cross-country runner in high school—nothing special. I attended WKU as an unrecruited walk-on but found myself training every day with world-class runners. I was completely over my head but I hung in there and eventually broke through to a higher level. My modest success as an undergrad convinced me that if I did everything right I could qualify for the U.S. Olympic Marathon Trials in 1980. I was accepted to law school in 1978, but opted to stay at WKU to pursue that goal. By the grace of God, I did qualify for and compete in the 1980 Olympic Marathon Trials. Unless I can get *Roe v. Wade* reversed, I doubt that I can do anything in the legal profession more satisfying. Anyway, I had higher hopes for 1984 but my running career flamed out in injuries. In 1985, I began law school at the University of Illinois. After one year I transferred home to the University of Cincinnati to finish my degree. In May 1989, I was sworn in to practice law in Ohio.

What type of law do you practice in addition to your pro-life work?

I have always been a solo practitioner sharing office space with my dad, James Condit, Sr., and his partner Jack Dressing. It was an ideal situation coming right out of law school, having the support and structure of their law firm but still independent. At their request, I assumed responsibility for a small number of Ohio Workers Compensation files, representing injured workers, and developed it as my core practice. It is dreadfully unromantic, but it has been my primary source of income and is still 75% of my practice.

Could you tell me the history of your pro-life work? Did you start out initially doing a case for the Life Legal Defense Foundation?

No. In fact, my dad and Jack Dressing were the two most active Cincinnati attorneys who would litigate pro-life cases. My father was always involved in Catholic causes; a fighter for the Faith, for Catholic education and so forth.

In 1986, Planned Parenthood sued my brother and three other pro-life leaders for supposedly unlawful picketing activities. Planned Parenthood had everything but the evidence. It turned into a scandalous case of pro-life persecution. I contributed what little I could while still in law school, but the case lasted so long that I was able to argue it to the Supreme Court of Ohio in February, 1990.

The *Planned Parenthood* case shaped my legal personality early on. It taught me that no right is so precious that it cannot be denied to a pro-lifer, and that bizarre legal principles will be created

and upheld in pro-life cases. In *Planned Parenthood*, for example, there were allegations of misconduct against four people in the context of large weekly demonstrations. After many days of hearings, and without finding that any individual had engaged in misconduct, the trial judge granted Planned Parenthood's motion to certify a defendant class of picketers under Civil Rule 23. He then enjoined and strictly regulated the entire class, which was defined as all "persons picketing" in a one-block geographical area who were served with injunction. My father and Mr. Dressing, over their objections, were appointed representatives of the bizarre defendant class, which changed and expanded every time a new person showed up to picket. It was an injunction against the world. We argued from the outset that no court could issue a binding order against innocent non parties, but the judge adopted Planned Parenthood's novel theory that by certifying a defendant class it could exercise jurisdiction over everyone who was later served with the order. The Court effectively enjoined (in advance) everyone who showed up to picket. The Rev. Jerry Falwell came to town one week to support the pickets and was made a "class member" when he was served with the order. We still laugh about that. Dozens of people were arrested and cited for alleged violations of the injunction, including people who thought they were obeying it. Thirteen people were ultimately convicted of contempt for alleged violations of the order, mostly for things like kneeling quietly in prayer.

The case finally went up to the Court of Appeals, which struck down the class certification as an abuse of discretion, but still upheld all of the contempt convictions. The result made no sense. If the class certification fell, the convictions of non parties had to fall with it because the "class" was the only vehicle by which the Court claimed jurisdiction to bind them. The Supreme Court of Ohio gave us hope when it agreed to hear the case in 1990, but then shocked us by not only unanimously affirming the contempt convictions, but going further to validate the concept of the defendant class. The Court's opinion omitted most of the facts helpful to our position, so anyone reading it will not comprehend the depth of the error, on First Amendment grounds and otherwise. In the end, the Supreme Court of Ohio allowed a trial court to deprive innocent non-parties of their right to free speech on a public sidewalk without a hearing, based upon the conduct of strangers with whom they had no affiliation. It is an astounding violation of due process which would never survive a challenge from, say, homosexual rights activists or pornographers.

Anyway, to make a long story longer, the *Planned Parenthood* case launched me into various civil suits on behalf of pro-lifers. In one case, a protester was speaking out against abortion on a public sidewalk in front of Planned Parenthood. He was arrested by Cincinnati police officers who later claimed the protester was trespassing on clinic property (contrary to 50 pro-life eyewitnesses). Ignoring the pleas of the protester, the police abandoned his two young weeping children at the clinic in a crowd of strangers seven miles from their home. The police lied in their depositions, thereby creating a core fact dispute, but the officers and the city were granted summary judgment. Immunity for everyone. The Court of Appeals distorted the facts to uphold that result. Neither

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## "SAFE LEGAL ABORTION"

In 1999, Senator Ray Haynes carried Senate Bill 149, "The Sharon Hampton Act", inspired by the case of Sharon Hampton, who bled to death from a punctured uterus at the hands of abortionist Bruce Steir. She died while being driven home by her mother. Her three-year-old son was in the car.

The Act would have protected women from "safe, legal abortion" by requiring abortion clinics to follow the same standards as other outpatient clinics.

For example, things like emergency equipment would have been required should complications arise from the abortion procedure.

Unfortunately, SB 149 failed passage in the Senate Committee on Health and Human Services by a vote of 2 to 6. The aye votes were Senators Haynes and Mountjoy. The no votes came from Senators Escutia, Hughes, Polanco, and Solis, three of which are women. It appears that these Senators were more concerned with the pro-abortion lobby's profit margin than they are with the lives of women and children. Moreover, the committee analysis of SB 149 implied that abortion services are marginalized by the anti-abortion protests that go on at abortion clinics, not the staff that actually perform abortions inside the closed doors of the clinic.

Riverside County Superior Court Judge Vilia Sherman saw things a little differently. She sentenced abortionist Bruce Steir, accused of gross negligence and a lack of due caution, to one year in jail for the involuntary manslaughter of Sharon Hampton. Steir was immediately taken into custody.

Prosecutor Kennis Clark argued that Steir failed to call emergency services because he was already on probation for previous allegations of negligence. 68-year-old Steir admitted making a mistake but said he was unaware of Sharon's condition.

[Six months of the one-year sentence was immediately suspended for 1,000 hours of community service(?!)—Ed.]

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Street preacher of pro-life message harassed. Case at discovery stage.

**Wilkerson (PP) v. Scott et al. (San Diego)**—Injunction and \$2,500,000 damages suit against multiple sidewalk counselors. Trial and discovery stayed as an appeal of the preliminary injunction is pending. In the meantime, two defendants have been dismissed and \$15,500 awarded against PP.

**Family Planning Associates v. Wilson (Los Angeles)**—FPA’s improper and illegal disposal of personal client information led to this lawsuit against pro-life activists who exposed the clinic’s negligent practices. Unfortunately, the case was assigned to a judge whose initial rulings made very clear that the Wilsons would not prevail. Though they were willing to keep fighting, when the judge himself ruled on (and denied) the Wilsons’ motion to disqualify him, and the court of appeals denied their writ on the matter, they realized that they were likely to do more harm than good by appealing any final order from the trial court. At the same time, FPA offered a settlement which allowed the Wilsons to continue their protest activity, if they in turn would abandon any claim to FPA’s garbage and any information—including information identifying FPA’s employees—derived from it. The Wilsons agreed to the settlement. In the meantime, a class action against FPA, brought by patients whose records were improperly disposed of, continues with the Wilsons named by FPA as cross-defendants.

**U.S. v. Operation Rescue et al. (Ohio)**—Federal FACE case. Judge declared mistrial due to government attorney misuse of witness testimony. Settlement reached before retrial.

**Wilkerson v. Redding School District**—Elderly school leafleters harassed and falsely charged with interfering with school. Civil suit filed.

**Amy Jo Mattson v. MKB Management Corporation dba Red River Women’s Clinic (North Dakota)**—False Advertising suit. Abortion mill claims no link between breast cancer and abortion.

**Hill v. Colorado**—LLDF amicus brief filed

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## CASES

### A Personal Interest?

On May 18, the North Dakota Supreme Court heard oral arguments in *North Dakota v. Family Life Services (FLS)*, in which the pro-abortion state attorney general placed an entire pro-life ministry into state-governed receivership.

The State additionally urged the trial court to appoint a new governing board for this religious ministry, to be made up of members whom the court and the attorney general considered to be sufficiently religious and of sufficiently like mind with the former board to carry out the ministry’s mission. Attorney Peter Crary, on behalf of FLS, appealed, citing the ministry’s First Amendment right to autonomy and freedom from state interference. Herb Titus, founding dean of Regent University Law School, wrote the appellate brief for FLS and argued the case. The courtroom was filled to capacity with Christians concerned about the rights of a ministry to operate free from state takeover.

Attorney Crary long ago realized that the trial court judge was taking a very personal interest in the case, but how much of an interest became alarmingly clear shortly after the Supreme Court hearing.

At the hearing, the Justices clearly expressed their displeasure at the judge trying to make decisions on a religious basis. Several days later the trial judge wrote an unprecedented letter to the Supreme Court stating that he had listened to the webcast of the oral argument. “Based on the questions posed,” he wrote, “it may assist the Justices in understanding what the trial court did by reviewing pages 55, 1254-1260 of the transcript.” In effect, the trial court was trying to argue the case on appeal!

Two defendants filed written objections. On May 31, 2000, the Court ruled: “As there is no authority for the trial court’s submission, it is rejected and will not be considered by this

*In effect, the trial court was trying to argue the case on appeal!*

Court.” Most astounding is the fact that the transcript pages cited by the judge relate solely to one of the defendant’s credentials as a minister of the gospel. The judge was explaining to the Supreme Court that he had to remove and reappoint the FLS board of directors because this defendant was not religiously qualified to run a ministry! Thus, in trying to justify his actions to the Supreme Court, the trial court was driving home the defendants’ point, i.e., that the court has no business ruling on the religious qualifications of individuals involved in a private religious ministry.

Please keep this case in your prayers. After 4-1/2 years, there is hope that justice may finally be served. **L**

ON THE WEB

[www.ildf.org](http://www.ildf.org)

Dana Cody

## Creating Law

**With nothing left to accomplish in the fight for unrestricted, tax-payer funded abortion in California, pro-abortion state legislators this spring embarked on a different pet project: demonizing pro-life activists. On February 24, State Senator Deborah Ortiz (D-6) introduced SB 1945, entitled the Anti-Abortion Crime Law Enforcement Act. The bill's language of intent begins, "The Legislature finds and declares that antiabortion crime and hate crime differ in concept but often converge in practice, and that law enforcement should address them in concert."**

To accomplish that goal, SB 1945 would require the state Attorney General to direct local law enforcement to report incidents of "antiabortion crime" as crimes motivated by the victim's membership in a protected class.

Moreover, guidelines would be developed to aid in training local law enforcement to address "antiabortion crime." The commission charged with developing the training guidelines would consult with the "appropriate" groups and individuals having an interest and expertise in the field of reproductive health.

SB 1945 also would amend Civil Code section 3427, a statute passed in 1993 as California's version of the federal FACE law, prohibiting blockades of "health care facilities." One subsection, §3427.3, contains provisions protecting the privacy of patients, licensed health practitioners, employees, clients, or customers of health care facilities which sue for physical interference with the facility under this section. Under this section, courts may order that such individuals be allowed to testify pseudonymously in any such action. SB 1945 adds "volunteers" (meaning abortion clinic escorts) to this protected class of witnesses.

On April 6, I contacted staff at Senator Ortiz's Capitol Office about the violation of the equal protection clause of both the U.S. and California Constitutions contained in the bill text because it does not treat abortion advocates and foes equally under the law. I was advised that unless data could be provided establishing that crimes against abortion foes

occur, the bill would not be amended to add them as a protected class.

On April 7, I faxed 26 pages documenting violent crime against abortion foes, as requested. The documentation evidenced 5 to 7 incidents of violence against pro-lifers, with a letter stating more police reports and videotapes of such violence could be produced, if necessary. I faxed the same documentation to the Senate Public Safety Committee, which is the committee where the bill would be heard first and its fate decided by committee members' vote.

On April 11, the bill was heard by the Public Safety Committee. The incidents of violence against abortion foes were not mentioned. The bill was insignificantly amended and referred to the same committee.

On April 13, I received a report published by the Senate Office of Research. The report documented crimes only against abortion advocates, including newspaper accounts of such violence. The newspaper reports of violence against four antiabortion healthcare facilities, which were faxed to Senator Ortiz and the Senate Public Safety Committee, were not part of the report. After receiving the report, I made an appointment to review the committee file to see what other documentation exists to support the bill.

On April 19, as a resident of Senator Ortiz's district, I sent a letter expressing concerns about the equal protection violations in SB 1945 and the fact that the senator was not rep-

(RECAP CONT. FROM PAGE 4)

at U.S. Supreme Court. Supreme Court's decision detailed p. 1 this issue.

**DeParrie v. Hanzo et al. (Oregon)**—Civil rights suit against abortion clinic director for defamation and civil rights violations.

**Planned Parenthood v. ACLA et al.**—Pro-lifers found liable for "threats" in posters exposing abortionists. LLDF assisted pro per defendant in filing appellate brief in 9th Circuit.

**Crone v. Resurrection Health Care Corp. (Illinois)**—Psychiatric Nurse suing for wrongful termination, violation of religion, etc. for refusing to dispense "day-after" pill. Case in discovery phase.

**Dym v. White**—First Amendment/Due Process case, involving a judgment against ORC (Operation Rescue of Calif.) after a kangaroo court judge/trial, without the right to cross examine witnesses. Case is on appeal.

**Magnolia Corp. et al. v. Unterburger, et al.**—Sidewalk counselors in Florida sued by abortion mill.

**Villarroel v. Ohio Hospital**—Family sues because mother euthanized against expressed wishes. Case in discovery phase.

**Planned Parenthood of Central Pa. v. Snell, et al.**—Five sidewalk counselors sued; abortion clinic is seeking injunction.

**Spingola v. Village of Granville Ohio**—City passed vague ordinance to apply as needed against pro-lifers at public events. Preliminary injunction denied. Appeal under consideration. **L**

### WANTED

LLDF is receiving calls from people whose loved ones are being denied necessary medical treatment. We need local attorneys to assist us in these matters. LLDF is currently compiling model briefs, petitions and other forms for use in these cases.

Please consider making a tax-deductible contribution today. Your generosity allows LLDF to fulfill its mission to provide a trained and committed voice in the courtroom so that pro-lifers can continue their life-saving work.

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the Ohio Supreme Court nor the U.S. Supreme Court would even review the case.

In another case, we sued the county sheriff and the city police for arresting twenty people for allegedly violating the injunction discussed earlier. We later learned that the police and Planned Parenthood's attorneys had devised a scheme to let Planned Parenthood's clinic workers decide who should be arrested. Innocent people, some of whom were never even served with a copy of the injunction, were arrested without violating it and absent any independent judgment by the police. If Planned Parenthood selected you for arrest, you went to jail. Again, in our civil suit we could not even get to a jury. Immunity for the civil rights of violators. No remedy for pro-life victims.

I also began representing rescuers as soon as I passed the Bar, probably 200 or more between 1989 and 1995. Rescuers were my favorite clients—no money and absolutely no expectation of winning.

**How did you first connect with Life Legal?**

My only case for Life Legal was a Chuck Spingola case. I don't exactly know how you referred Chuck Spingola to me. I had certainly heard of Life Legal but had never worked with the organization.

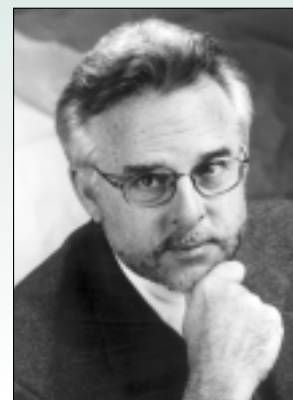
**Our Mary Riley is a bloodhound. She can find a pro-life lawyer anywhere.**

I'm so happy that she contacted me. Chuck Spingola came to me on these facts. He is an independent preacher who goes to college campuses preaching against sin, fornication, homosexuality, and abortion. You can imagine how well received he is. Chuck went to Ohio University on a number of occasions to preach in a grassy park-like area known as the Monument Area of the College Green, a daily gathering place where hundreds of students assemble in good weather to talk, eat lunch, play sports, sing, play musical instruments, and generally engage in all forms of speech. There was a permit scheme for reserving buildings and facilities elsewhere

(INTERVIEW CONTD ON PAGE 8)

Wesley J. Smith

## Bioethics Stacks the Deck Against "Non-Persons"



The denouement of the case of Herman Krausz, who died in 1998 at the Jewish General Hospital in Montreal after his respirator was removed over the objections of his family, brings into focus the growing importance of bioethics in Western medicine.

The coroner's report in the case recommended that "independent mediators" be appointed when, as in the Krausz matter, families wish to continue life-sustaining treatment and physicians wish to call it quits. That sounds good but there is a potential problem: These mediators are likely to be trained in the philosophy of mainstream bioethics, a field that is undergirded by moral values that are at odds with those of most of the population.

Bioethics began as a multidisciplinary philosophical discourse among theologians and philosophers about 30 years ago. At first, participants in the intellectual discussions held differing points of view. Some were wholehearted believers in the sanctity of human life, while others took an explicit or implicit utilitarian approach. Over time, the adherents to the sanctity of human life steadily lost influence to the point where the predominant thinking in the field crystallized into what can be fairly called an ideology. Thus, while every "bioethicist" may not necessarily ascribe to every aspect of the prevailing bioethics belief system, the values inculcated by bioethics education generally reflect the ideology of the mainstream bioethics movement.

Bioethics values and those of most "real" people differ in crucial respects. Most people

want their doctors to take the Hippocratic Oath. Bioethics rejects Hippocratic medicine as "paternalistic." Most people, whether or not they are religious, believe in the sanctity/equality of human life, i.e., that all human beings have equal inherent moral worth and therefore must be treated with equal dignity. What matters in bioethics, however, is the "quality of life" and whether one has sufficient cognitive capabilities to be a "person," a designation that does not extend to every human but which some bioethicists, such as Princeton University's Peter Singer, believe should include many animals.

The criteria used to distinguish between persons and non-persons are still being debated in bioethics journals and books and at academic symposia. But the categories of human beings who mainstream bioethics ideology holds are probably not persons are pretty much established. "The unprotected," writes Tom L. Beauchamp, an influential bioethicist from Georgetown University, "would presumably include fetuses, newborns, psychopaths, severely brain-damaged patients, and various demented patients." The consequences of being stripped of personhood? Beauchamp suggests that humans who are not "moral persons" could be exploited in some of the ways animals are now. "If this

conclusion is defensible,” Beauchamp writes, “we will need to rethink our traditional view that these unlucky humans cannot be treated in the ways we treat relevantly similar non-humans. For example, they might be aggressively used in human research subjects and sources of organs.”

The values of mainstream bioethics—epitomized by personhood theory—are not merely

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*Mediators are likely to be trained in the philosophy of mainstream bioethics, a field that is undergirded by moral values that are at odds with those of most of the population.*

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theoretical. They are increasingly applied in hospital corridors and nursing home wards, and are spread through continuing medical education classes given to physicians, nurses, social workers, and others—the very people likely to assume the mantle of “mediators” in health-care delivery disputes.

This is precisely what befell the Krausz family. Herman Krausz fell victim to “futile care theory” that many bioethicists assert permits doctors to unilaterally refuse desired treatment when they perceive that the quality of the patient’s life isn’t worth the investment of resources; financial or emotional. Indeed, despite the Krausz coroner’s finding that doctors should have obtained consent before shutting off Herman’s respirator, the hospital spokesperson defiantly claimed that the report held they should have removed the respirator sooner.

Such hubris reflects a fundamental disagreement that extends far deeper than details of the care of one patient. It was the very value of Herman Krausz’s life that the family and doctors disagreed about, which played out in the dispute over his treatment. If the mediators that the coroner hopes will defuse similar future disputes are trained in the values of bioethics, there is the danger that they will not be neutral communication facilitators as the coroner envisions but parties to the iron-vise pressure increasingly placed on families to bend to the will of the “new medicine.”

In theory, ethics mediators can be helpful in achieving true family/doctor consensus when they and physicians struggle in good faith through difficult medical decisions. Indeed, there are many stories of successful mediations that satisfied all concerned. However, there is the danger that the deck will be stacked. That means beleaguered families must stand ready to fight for the lives of their loved ones—with lawyers if necessary. Bioethics theory is one thing; but the love of a family should not take a back seat to the philosophy of strangers.

[This article was originally published in *National Post* (February 25, 2000) and has been reprinted with the kind permission of the author, Wesley J. Smith, an attorney for the International Anti-Euthanasia Task Force and the author of *Forced Exit: The Slippery Slope from Assisted Suicide to Legalized Murder*. His next book, *Culture of Death: The Destruction of Medical Ethics in America*, will be published this year.] **L**

## MARK YOUR CALENDARS

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Nationally known author, speaker and attorney Wesley J. Smith will speak about the dangers of euthanasia and the state of medical ethics in America at Life Legal Defense Foundation’s annual dinner on [Saturday, November 11](#).

Smith is widely known for his most recent book, *Forced Exit: The Slippery Slope from Assisted Suicide to Legalized Murder*, published in 1997. *Forced Exit* is a broad-based criticism of the assisted suicide/euthanasia movement.

Smith has been an anti-euthanasia activist since 1993. A consultant for the International Anti-Euthanasia Task Force, he has filed amicus briefs on behalf of the IAETF opposing the legalization of assisted suicide in federal and state courts, including in the United States Supreme Court.

His forthcoming book is *The Culture of Death: The Destruction of Medical Ethics in America*, a warning about the dangers of the modern bioethics movement. It will be published this fall, and Smith will sign copies at LLDF’s November 11 dinner.

A native of Los Angeles, Smith practiced law there from 1976-1985. He was a partner in his own law firm and served on several bar association committees, including the California State Bar Committee on Public Affairs.

Smith’s writing and opinion columns on assisted suicide, bioethics, legal ethics, and public affairs have appeared in national and regional publications throughout the country, including, *Newsweek*, *New York Times*, *The Wall Street Journal*, among many others. He also wrote the chapter on assisted suicide for the *Encyclopedia of Crime and Justice* and an article on the topic in Microsoft’s on-line encyclopedia, *Encarta*.

Smith has appeared on more than 800 television or radio talk/interview programs.

The Life Legal annual dinner will be held at the Bellevue Club in Oakland, near Lake Merritt. Tickets are \$100.00 per person. Reservations are required, and may be made by contacting LLDF at (707) 224-6675. The deadline is November 2, 2000. **L**

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on the College Green, but no permit process for the Monument Area. Traditionally, the campus police ordered preachers to stay on the nearby sidewalk even though everyone else was permitted to gather in the Monument Area to debate and insult the preachers. One day Chuck refused to move to the sidewalk when non preachers were permitted to continue speaking as they wished from the Monument Area. A woman began screaming at Chuck that he had no right to be there and called the police. Chuck stood his ground and asserted that he would not be treated like a second class citizen on public property any longer. He was arrested and charged with criminal trespass and a concocted resisting arrest charge.

We raised three issues in defense, all of which had undeniable merit. First, the Monument Area is a public forum in light of its daily usage as a gathering place. Therefore, Chuck had every right to speak there. Second, we raised a vagueness challenge due to the absence of any standard or University policy defining speech and assembly rights there. Third, we argued that Chuck was a victim of a discriminatory prosecution in light of the fact that he alone was singled out from a vocal crowd and arrested for peaceful religious speech. After a motion hearing which established the essential and undisputed facts, Chuck agreed to enter a plea of no contest in exchange for the state's dropping the resisting arrest charge. We reserved all constitutional issues for appeal, which was argued last fall.

One of the three appellate judges really drilled the prosecutor on our vagueness argument and was visibly dissatisfied with the response. We left oral argument knowing that one judge was on our side, maybe two. The decision arrived two days before Christmas: conviction affirmed, three votes to zero. Unbelievable, but very typical. I find that judges like to appear interested in protecting First Amendment rights of Christians, but then write opinions which omit facts which are favorable to the Christians and which would require a different result if mentioned. Anyone reading the opinion would not understand how misleading it is. In Chuck's case, for example, a street vendor testified that the Monument Area, where he did business

every day, was "a commons" where students gathered every day to engage in every form of recreational activity and speech. It was compelling but neutral testimony about the nature of the forum. The Court of Appeals opinion omitted his testimony altogether and instead portrayed the Monument Area as a virtual outdoor library disrupted only by Chuck Spingola. Very dishonest opinion.

I filed a motion for reconsideration calling the glaring omission to the Court's attention, but it was denied without comment. We appealed to the Supreme Court of Ohio, which refused to review the case. We are now considering whether to file a petition with the U.S. Supreme Court.

**Under what circumstances would you hope to get such a case reviewed by the United States Supreme Court?**

You can have the most meritorious case in the world and it means nothing. I remember watching Chief Justice Rehnquist on C-SPAN in 1996 explaining the standards under which the Court exercises its certiorari jurisdiction. He stated, "The fact that a case has been wrongly decided, or even that a great injustice has been done, is not a reason why the Court will hear a case." I could not believe my ears.

My reaction was "Why does the Court exist? Other than occasionally taking a case to further wreck our culture, what is the Court doing for anyone?" If the Court knowingly permits wrongfully decided cases to stand, creating bad precedent to be followed in later cases, who could it possibly be serving? It is probably an unintended admission by the Chief Justice that here are so many wrongly decided cases, so many injustices perpetrated in the lower courts, that the Supreme Court could not begin to correct them all even if it had the will to do so.

**Are you litigating any other interesting pro-life cases?**

I have been litigating two residential picketing cases out of Fargo, North Dakota since 1993. Two different groups of pro-lifers were arrested in 1991 for walking on residential sidewalks. In one case, pro-lifers were lawfully picketing against abortion within the parameters set forth

by the Supreme Court in *Frisby v. Schultz*. In the other case, pro-lifers walked in silent prayer in the clinic director's neighborhood, without signs and without speaking. Both cases presented slam-dunk First Amendment violations, which is why I decided to litigate them 1,000 miles from home.

The trial judge ruled in our favor three times and was reversed by the Eighth Circuit all three times. I was shocked when the Eighth Circuit gave qualified immunity to the arresting police officers, but the trial judge ultimately granted summary

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*He is an independent preacher who goes to college campuses preaching against sin, fornication, homosexuality, and abortion. You can imagine how well received he is.*

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judgment against the City of Fargo in both cases for its facially unconstitutional ordinance.

After recovering modest damages at two jury trials, the trial judge awarded more than \$125,000 in attorneys' fees and costs. Now remember that I am a solo practitioner, a little guy. That is a life changing attorney fee for me. Last summer, within a six week time frame, an Eighth Circuit panel took it all away. The opinions were just unbelievable. Inaccurate and, as usual, selective in their presentation of the facts. One of them created a direct conflict with Eighth Circuit precedent less than four years old. It must have disturbed enough of the judges that we were granted rehearing en banc.

(INTERVIEW CONT'D ON PAGE 12)

(CREATING LAW CONT. FROM PAGE 6)

resenting her constituency in an even-handed manner. On April 25, staff from the Senator's office left me a voice mail message stating that I would be apprised of any amendments to the bill.

On April 25, the newly-amended bill passed out of committee and to the Senate Appropriations Committee. Again the amendments were insignificant. However, staff from the Senator's office did not mention any amendments during our earlier phone conversation, as had been promised.

On April 28, after receiving no return call from the committee consultant, I went to the committee office and reviewed the file. Not surprisingly, Planned Parenthood is the bill sponsor. Supporting the bill are (try to contain your surprise!) National Abortion Rights Action League, California Abortion Rights Action League, and the California Medical Association. Included in the bill file is a report from the Feminist Majority Foundation, "The 1999 National Clinic Violence Survey Report." Not one statistic or incident was documented with a police report or any other data. (After doing a little research, I learned that when contacted about a similar survey conducted in 1992, FMF refused to respond to requests for documentation. The research also uncovered the fact that one Operation Rescue incident with 100 participants was reported as 102 incidents of violence—1 clinic, 1 incident and 100 abortion foes. [Do the math.]

On May 3, I called staff at the Senator's office about meeting with the bill sponsor, Planned Parenthood, to try to work out amendments amenable to abortion opponents and advocates alike. The meeting was refused.

Additionally, I was told that too much time had already been spent discussing my position on the bill. When I informed the staffperson that a pro-lifer was shot in the face with a pellet gun in front of a Planned Parenthood facility in the Senator's District, the response was that this was not the facility in which Planned Parenthood's public affairs liaison for the bill was employed. Not only did staffperson's response indicate Senator Ortiz was already aware of the incident, not the least bit of concern was expressed by staff for the condition of the victim. Last, staff could not guarantee without more documentation that the bill would be amended to include abortion

opponents as a protected class. Staff promised a phone call with an update as to the status of the bill amendments after meeting with the sponsor. Shortly after the call, I faxed additional documentation to Senator Ortiz evidencing acts of violence against abortion foes.

On May 9, the bill was amended to remove the intent language quoted above.

Still, only crime against abortion advocates would be documented; only training as it related to crime against abortion advocates would occur should SB 1945 be enacted.

On May 15, lobbyist Art Croney from the Committee on Moral Concerns took copies of the information I faxed to Senator Ortiz over one month before and presented it to the members of the Senate Appropriations Committee. Several of the committee members shared concerns that SB 1945 did not include abortion foes as members of a protected class. Senator Ortiz left the hearing having been admonished to amend the bill.

During a conversation on May 24, I learned that staff at Senator Ortiz's office informed Mr. Croney that "antiabortion crime" may be changed simply to "crime." While encouraging, it is highly questionable whether clinic staff will report criminal activity against abortion foes when it has been the experience of Life Legal that clinic staff often condone and even participate in such activity. The result would be skewed statistics.

As of May 25, the bill still sits in the Senate Appropriations Committee. It remains to be seen if the bill will be amended and/or proceed to the general Senate for a vote. As of June 26, 2000, SB 1945 remains in Senate Appropriations, missing the June 5, 2000, deadline to pass out of the House of Origin. Keep in mind, however, that the Legislature does continually change the rules, or use rule waivers to advance legislation.

Though a quick response from concerned groups and constituents was apparently successful in stalling SB 1945 for the time being, it is clear that the mindset behind it is alive and well. For example, when a representative from the Respect Life Committee at the Catholic Diocese of Sacramento questioned Senator Ortiz about SB 1945, the Senator's response was to ask the representative if she planned to bomb an abortion clinic.

Also, Planned Parenthood's interest in the bill at least appears to be more than simply academic, and the bill's timing seems more than coincidental. In *Planned Parenthood Golden Gate v. Foti*, a cross-complaint brought by Planned Parenthood in response to a lawsuit from pro-life activist Ross Foti, Planned Parenthood sought an order from the trial court allowing its staff and escort witnesses to be identified only by pseudonym. Although Planned Parenthood is not suing under C.C. §3427, it argues that the provisions of that section should apply to any action which pits abortion clinics against pro-life activists. According to Planned Parenthood's logic, the very fact that it accuses pro-lifers of wrongdoing establishes the need to "protect" its staff and volunteers from these presumed violent protesters. Attorneys for the pro-life protesters opposed Planned Parenthood's motion, arguing that not only was such an order unnecessary and burdensome, but it would be very prejudicial to the pro-lifers at trial, by implying that a court had already ruled that they were dangerous individuals.

In the same action, Planned Parenthood has launched a personal attack on LLDF Legal Director Katie Short, who represents Foti, and attorney Terry Thompson, who represents two other protesters, claiming that because these attorneys are "known anti-abortion protesters," they cannot be trusted to abide by an "Attorney-Eyes Only" protective order covering staff and volunteers' home addresses.

When the trial court failed to adopt Planned Parenthood's extreme position and instead ordered it to identify witnesses, including staff and volunteers, and to provide addresses to the attorneys, Planned Parenthood filed a writ in the court of appeal. The court of appeal has set a hearing on the matter for July 13.

To look at current proposed legislation, or to check the status of SB 1945, visit the Legislative web site at [www.leginfo.ca.gov](http://www.leginfo.ca.gov). If you have police reports, videotapes, or other evidence of crime against pro-life individuals, please mail it to LLDF, P.O. Box 2105, Napa CA 94558. Should this bill proceed, we need to be prepared to validate the concerns expressed above. **L**

(WHATEVER-IT-TAKES CONT. FROM PAGE 1)

had stated in his brief that “[e]ach provision of the statute was chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement.”

One would think that the statute’s broad prohibitive language would have been sufficient to enforce the state’s interest. Indeed, if keeping the clinics open and preventing blockades was the only interest the State had in mind, one would think that §2 would have been the end of the matter.

Not so, however. Section 3 of the act prohibits “approaching” within 8 feet of any person for the purpose of “passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling” such person unless the person gives consent. This restriction applies within 100 feet of any “healthcare facility” in the state of Colorado. This section was challenged by pro-life counselors and upheld by the Court, leading to three questions: (1) Why are the speech restrictions of §3 necessary when §2 took care of the “bad conduct” problem? (2) How can the Court single out “protest, education, and counseling” speech? (3) How can the Court justify a floating 8-foot zone free of uninvited speech on a public sidewalk?

### Why Speech Restrictions If Clinic Access was the Problem?

As noted above, the Colorado legislature was not trying to protect people from unwelcome speech; rather the legislature justified the statute on the following grounds: “The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person’s entry to or exit from a health care facility.”

Even the majority understood that there would be a logical problem in restricting leafleting, oral protest, education, or counseling if the only problem to address was physical clinic access. In order to get to the desired end of curtailing peaceful pro-life speech, the Court set the Colorado legislature straight, stating that the legislature’s goal should have been “to protect those who seek medical treatment from the

potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range.” And presto!—the Court has just made “deliver[ing] a message” a permissible activity to restrict.

Justice Scalia thoughtfully pointed out that, with regard to the state interest being advanced, “there appears to be a bit of a disagreement between the State of Colorado (which should

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*It’s very simple: only the first type of speech, the type that the First Amendment was intended to protect, can get you thrown in jail under this statute.*

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know) and the Court (which is eager to speculate)... We may thus add to the lengthening list of ‘firsts’ generated by this Court’s relentlessly proabortion jurisprudence, the first case in which, in order to sustain a statute, the Court has relied upon a governmental interest not only unasserted by the State, but positively repudiated.”

Thus, the answer to the above question (“Why speech restrictions if clinic access is the problem?”) is that speech restrictions make more sense after the Supreme Court changed the goal of the statute.

### How can the Court single out “protest, education, and counseling” speech?

As Justice Scalia noted in his “happy speech” example, if the Court can restrict “protest, education, and counseling,” then that same

reasoning would justify a law which placed restrictions on all speech except that which “conveys a sense of contentment or happiness.” This straightforward argument troubles the majority. In order to extricate themselves from such an Orwellian nightmare of a law which only allows for “happy speech,” the Court resorts to an artificial distinction. It is “most unlikely” that speech falling outside the categories of “protest, education, and counseling” will have negative consequences.

However, it is likely that “protest, education, and counseling” speech brings forth a host of negative consequences, including “the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her.”

In case you didn’t catch that, the High Court has just stated that all sidewalk counselors are likely to serve as a “threat[ening]” “dogging” “nuisance” when they ask a woman to take a leaflet. One wonders if the Court would consider clinic escorts as lovers of humanity or merely as protectors of the weak. In any case, the answer to the question of how the court could single out “protest, education, and counseling” is that such speech allegedly lends itself to aggressive physical tactics which can cause “potential trauma” for those exposed to “confrontational protests.” Such speech also is the only speech which can touch minds and hearts and consciences, but the Court evidently sees this as a lesser interest than unimpeded access to abortion.

The Court answers the practical “how” question of singling out “protest, education, and counseling” from other speech by assuming that there are only two types of speech in the world: protest, ed. and c. on the one hand, and “social or random conversation” on the other. It’s very simple: only the first type of speech, the type that the First Amendment was intended to protect, can get you thrown in jail under this statute.

Not only was this irony lost on the justices, but

they refused to see how difficult it will be to distinguish prot., ed. and c. in real life, stating “it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether ‘sidewalk counselors’ are engaging in ‘oral protest, education, or counseling’ rather than pure social or random conversation.” In a sense, the justices may be correct that this is not a content-based regulation on speech. Rather than looking to the content, the justices are apparently suggesting that it is sufficient to look at who the speaker is to determine if there is a violation.

It takes only a little more imagination than the majority apparently possesses to think of hundreds of ways for a sidewalk counselor to start a conversation which would be difficult to classify: “Jesus loves you.” “God bless you and your baby” “Isn’t it a great day to be alive?” Protest, education or counseling? Or social conversation? Pity the police officer, the district attorney, the jury or judge who is called upon to parse the words in order to enforce this “content neutral” statute which is “not a regulation of speech.”

### How can the Court justify a floating 8-foot zone free of uninvited speech on a public sidewalk?

Under the statute, sidewalk counselors must be given permission to approach someone closer than eight feet. However, Justice Scalia shows how there is no alternative to close sidewalk counseling and takes the majority to task for eliminating what may be the most effective method of pro-life speech.

In a uniquely insightful portrayal, he describes woman-to-woman sidewalk counseling as the actions “of a woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: ‘My dear, I know what you are going through. I’ve been through it myself. You’re not alone and you do not have to do this. There are other alternatives. Will you let me help

you? May I show you a picture of what your child looks like at this stage of her human development?’”

The High Court’s response is to justify the 8-foot zone as a “bright-line prophylactic rule” which by its clarity actually protects speech. In endorsing a “prophylactic approach,” the Court ignores recent decades of First Amendment jurisprudence declaring such approaches to be constitutionally suspect, choosing instead to resurrect dicta from 80-year-old cases which did not even mention the First Amendment.

Worse, the majority actually lectures sidewalk counselors on how eight-foot counseling-free zones will “assist[] the speakers’ efforts to communicate their messages. The statute might encourage the most aggressive and vociferous protesters to moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding sidewalk counselors like petitioners to make themselves heard.” In other words, sidewalk counselors should be grateful that ill-behaved pro-lifers won’t approach women; now sidewalk counselors have a better chance of shouting their tender message from eight feet away because the zone is empty of other pro-lifers (though not of pro-abortion escorts). Thus the court justifies the eight foot restriction zone by stating that broad restrictions help everyone and that this one is particularly helpful to sidewalk counselors. Justice Scalia laments the eight foot rule as being “an utter absurdity, which is no obstacle in abortion cases.”

As has been noted before, in our culture’s war to turn pro-life protesting into a malum per se, the fallout should be felt by all who value their free speech rights. As Justice Scalia said regarding the High Court’s denial of certiorari in an earlier case involving anti-abortion protesters, the Court “has damaged the First Amendment more quickly and more severely than I feared.” He is not alone, and we must now tremble both for the little ones who do not see the light of the day and even for those who do and grow up wanting to speak about the darkest practice of our enlightened age.

1. Though the majority repeatedly and insistently refers to the statute as one protecting people from “unwanted” speech and prohibiting “unwelcome” approaches, the statute is not limited to situations in which someone has rejected a proffered leaflet, speech, or approach. Rather, the section requires a speaker to gain the *consent* of a listener before approaching within eight feet to offer a leaflet or speak. Thus the statute is more accurately characterized as a restriction on *uninvited* speech, rather than *unwelcome* or *unwanted* speech.

The majority’s subtle shift of meaning eerily parallels pro-abortion rhetoric about “every child a wanted child.” Just as Planned Parenthood assumes that an unplanned pregnancy results in an unwanted child, the Court assumes that an uninvited approach means unwanted speech.

[Mike Millen is a San Jose civil litigation attorney, who, in his spare time, argues on behalf of pro-life advocates. He is convinced that a culture which values spotted owls and old growth redwoods more than almost-born-babies desperately needs the Good News of Christ.] **L**

### DUPLICATES

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### LIFELINE MISSION STATEMENT

The mission of Life Legal Defense Foundation is to give innocent and helpless human beings of any age, and particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

### LIFELINE EDITORIAL POLICY

The purpose of LLDf is set forth in our mission statement above. To that end, *Lifeline* welcomes all ideas, opinions, research and comments, and all religious and political points of view, so long as not seen to be clearly divisive, and so long as fundamentally based upon the twin pillars of truth and charity.

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LIFE LEGAL ANNUAL DINNER

Nationally known author, speaker and attorney Wesley J. Smith will speak about the dangers of euthanasia and the state of medical ethics in America at Life Legal Defense Foundation's annual dinner on Saturday, November 11.

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(CREATING LAW CONT. FROM PAGE 8)

We argued it in April to ten judges, several of whom will never vote in favor of the pro-lifers under any circumstance. I have some hope, however naive it may be, that we may get the five votes needed to affirm the District Court.

It sounds as if it has been entirely an uphill battle for you. How do you keep your spirits up?

It is very difficult at times. I would probably be happier teaching math and coaching cross country at a local high school. I would see my family more. The best way to describe my state of mind is to analogize to my running days. The sport is brutally fair. The conditions are the same for everyone. There were no incompetent umpires affecting the outcome with a bad call. When it was over, you knew everyone had a fair shake. All I ever wanted from the legal profession was the same kind of fairness. What a disappointment it has been. Too often, especially when pro-life Justice Scalia acknowledged the reality when he referred to the "ad hoc nullification machine" in abortion cases. So, yes, it can be very dispiriting.

I survived as a distance runner because I was stubborn and competitive. I couldn't survive as a lawyer without those qualities. But keep two things in mind. First, I have had a few victories to sustain me. Some judges do care more about applying the law and doing justice than in promoting their personal agenda. More importantly, I am always reminded that the perfect justice will be done on Judgment Day. I would not want the tone of this interview to mislead your readers. My life is good. I have been blessed with family, friends, and the Catholic faith. What else do I need? But, may God have mercy on the souls of those judges who do injustice deliberately.

Thank you very much Tom. I really appreciate your giving so much time.

I have nothing but good things to say about the Life Legal Defense Foundation and some of the other organizations with which I have occasionally collaborated—the Rutherford Institute, the ACLJ, etc. It has always been a pleasure to work with organizations which do so much for the cause of life. **L**